

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 445 Pretrial Detention and Release
SPONSOR(S): Criminal & Civil Justice Appropriations Committee; Dorworth
TIED BILLS: **IDEN./SIM. BILLS:** SB 782

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	<u>Public Safety & Domestic Security Policy Committee</u>	<u>13 Y, 0 N</u>	<u>Cunningham</u>	<u>Cunningham</u>
2)	<u>Criminal & Civil Justice Appropriations Committee</u>	<u>6 Y, 5 N, As CS</u>	<u>McAuliffe</u>	<u>Davis</u>
3)	<u>Criminal & Civil Justice Policy Council</u>	<u></u>	<u>Cunningham</u>	<u>Havlicak</u>
4)	<u></u>	<u></u>	<u></u>	<u></u>
5)	<u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

The bill creates s. 907.041(5), F.S., to establish eligibility criteria that will apply to all pretrial release programs. There are currently no pretrial release program eligibility criteria in the Florida Statutes – each county develops its own. The bill specifies that a defendant is eligible to participate in a pretrial release program only by order of the court if the defendant:

- Is not charged with a capital, life, or first degree felony;
- Has not, within the past year, willfully failed to appear at any court proceeding;
- Is not, at the time of the arrest, subject to or on probation for another charge and is not facing charges for another crime anywhere in this state;
- Has no prior convictions involving violence; and
- Satisfies any other limitation upon eligibility for release which is in addition to those above, whether established by the board of county commissioners or the court.

The bill requires the court to determine whether a defendant is eligible to participate in a pretrial release program and requires pretrial release programs to certify in writing that the defendant satisfies each of the above requirements. The bill also requires pretrial release programs to notify every defendant released to the program of the times and places at which the defendant is required to appear before the court.

The bill also specifies that if a defendant seeks to post a surety bond pursuant to a bond schedule established by administrative order, the defendant must do so without any interaction with, or restriction by, a pretrial release program.

The bill prohibits pretrial release programs from charging defendants any fees other than those authorized by state law, but permits such programs to charge defendants for services that have been ordered by the court.

The bill specifies that a court may order a defendant who does not meet the above-described eligibility requirements to participate in a pretrial release program if the defendant is eligible under state law to participate in a drug court program, mental health court program, or a prison diversion program.

The bill may have a fiscal impact on local government. See “Fiscal Comments.”

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Pretrial Release

Pretrial release is an alternative to incarceration that allows arrested defendants to be released from jail while they await disposition of their criminal charges.¹ Pretrial release is a constitutional right for most people arrested for a crime.² The primary consideration in deciding whether to grant a defendant pretrial release is whether the person presents a threat to the community, whether the person is a flight risk, or whether the person threatens the integrity of the judicial process.³

Types of Pretrial Release

Generally, pretrial release can be granted in one of the following three ways:⁴

Release on Own Recognizance

Release on own recognizance allows defendants to be released from jail based on their promise to return for mandatory court appearances.⁵ Defendants released on recognizance are not required to post a bond and are not supervised.

Bond

Posting bond is a monetary requirement to ensure that defendants appear in court when required. A defendant whom the court approves for this release must post a cash bond to the court or arrange for a surety bond through a private bondsman. Defendants typically pay a nonrefundable fee to the bondsman of 10% of the bond required by the court for release. If the defendant does not appear, the bondsman is responsible for paying the entire amount. As such, bondsmen have a vested interest in ensuring that their clients attend their court dates and do not abscond. Bondsmen are not required to supervise a defendant.

¹ Report No. 10-08, "Pretrial Release Programs' Compliance with New Reporting Requirements is Mixed," Office of Program Policy Analysis & Government Accountability, January 2010.

² Article I, Section 14, *Florida Constitution*, provides that unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions.

³ *Id.* See also, s. 907.041(1), F.S.

⁴ Report No. 10-08, "Pretrial Release Programs' Compliance with New Reporting Requirements is Mixed," Office of Program Policy Analysis & Government Accountability, January 2010.

⁵ Some defendants can also be released at the time of arrest with a notice to appear in court.

Pretrial Release Programs

Pretrial release programs⁶ actively supervise approved defendants. The programs do so through phone contacts, visits, and/or electronic monitoring until the defendant's case is disposed or until the defendant's supervision is revoked. Defendants generally are released into a pretrial release program without paying a bond. Defendants may be assigned to the program by a judge or selected for participation by the program. There are no pretrial release program eligibility criteria in the Florida Statutes – each county develops its own criteria for determining who is eligible for its pretrial release program.

Prior to a defendant being released to a pretrial release program, the program must certify to the court that it has investigated or otherwise verified:

- The circumstances of the accused's family, employment, financial resources, character, mental condition, and length of residence in the community;
- The accused's record of convictions, of appearances at court proceedings, of flight to avoid prosecution, or of failure to appear at court proceedings; and
- Other facts necessary to assist the court in its determination of the indigency of the accused and whether the accused should be released under the supervision of the program.⁷

According to a January 2010, report by the Office of Program Policy Analysis and Government Accountability (OPPAGA), Florida has 28 pretrial release programs, which are administered on a county basis by sheriffs, jails, or county government divisions. Pretrial release programs are primarily funded by the county and by fees charged to defendants who participate in the program.⁸

Section 907.043(3), F.S., requires pretrial release programs to prepare a register displaying information that is relevant to the defendants released through such a program. The statute specifies that a copy of the register must be located at the office of the clerk of the circuit court in the county where the program is located and must be readily accessible to the public. In addition, the register must be updated weekly and display accurate data regarding specified information.⁹

Presumption in Favor of Non-Monetary Release

The Legislature has established a presumption in favor of pretrial release on *nonmonetary conditions*. Section 907.041(3)(a), F.S., provides the following:

It is the intent of the Legislature to create a presumption in favor of release on nonmonetary conditions for any person who is granted pretrial release unless such

⁶ Section 907.043(2)(b), F.S., defines the term “pretrial release program” as an entity, public or private, that conducts investigations of pretrial detainees, makes pretrial release recommendations to a court, and electronically monitors and supervises pretrial defendants. The term does not apply to any program in the Florida Department of Corrections. *See s. 907.043(2)(b), F.S.*

⁷ s. 907.041(3)(b), F.S.

⁸ Osceola county's pretrial release program is permitted to charge participating defendants a \$2.70 fee per day for electronic monitoring, a \$4.90 fee per day for GPS, a \$4.75 fee for an alcohol monitoring device, a \$30.80 fee for a drug test, and a \$13.20 fee for an alcohol test. *See “Osceola County Corrections Department Proposed Legislation Impact Analysis” for House Bill 445.*

⁹ The information must include the name, location, and funding source of the pretrial release program; the number of defendants assessed and interviewed for pretrial release; the number of indigent defendants assessed and interviewed for pretrial release; the names and number of defendants accepted into the pretrial release program; the names and number of indigent defendants accepted into the pretrial release program; the charges filed against and the case numbers of defendants accepted into the pretrial release program; the nature of any prior criminal conviction of a defendant accepted into the pretrial release program; the court appearances required of defendants accepted into the pretrial release program; the date of each defendant's failure to appear for a scheduled court appearance; the number of warrants, if any, which have been issued for a defendant's arrest for failing to appear at a scheduled court appearance; and the number and type of program noncompliance infractions committed by a defendant in the pretrial release program and whether the pretrial release program recommended that the court revoke the defendant's release. *See s. 907.043(3)(b), F.S.*

person is charged with a dangerous crime as defined in subsection (4).¹⁰ Such person shall be released on monetary conditions if it is determined that such monetary conditions are necessary to assure the presence of the person at trial or at other proceedings, to protect the community from risk of physical harm to persons, to assure the presence of the accused at trial, or to assure the integrity of the judicial process.

Effectiveness of the Three Types of Pretrial Release

As noted above, the primary consideration in deciding whether to grant a defendant pretrial release is whether the person presents a threat to the community, whether the person is a flight risk, or whether the person threatens the integrity of the judicial process. In their January 2010 report, OPPAGA reviewed Miami-Dade county's 2008 data and reported that failure to appear rates were comparable for each of the different types of pretrial release, with defendants in pretrial release programs being slightly more likely to fail to appear than those released on bond or released on their own recognizance.¹¹ OPPAGA also found that Florida's pretrial release programs were following nationally recognized best practices for supervising defendants and reporting information to the courts.¹²

Rules of Criminal Procedure

Rule 3.131(b) of the Florida Rules of Criminal Procedure requires judges to impose *the first* of the following conditions of release that will reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process:

- Personal recognizance of the defendant;
- Execution of an unsecured appearance bond in an amount specified by the judge;
- Placement of restrictions on the travel, association, or place of abode of the defendant during the period of release;
- Placement of the defendant in the custody of a designated person or organization agreeing to supervise the defendant (e.g., pretrial release programs);
- Execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or
- Any other condition deemed reasonably necessary to assure appearance as required.

Thus, pursuant to the above, if a defendant's participation in a pretrial release program would reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the judge must order such participation *before* ordering the defendant to post a bail bond.

Effect of the Bill

As noted above, there are currently no pretrial release program eligibility criteria in the Florida Statutes. Instead, each county develops its own criteria for determining who is eligible for its pretrial release program. The bill creates s. 907.041(5), F.S., to establish pretrial release program eligibility criteria that will apply to each county's pretrial release programs. The bill specifies that a defendant is eligible to participate in a pretrial release program only by order of the court if the defendant:

- Is not charged with a capital, life, or first degree felony;
- Has not, within the past year, willfully failed to appear at any court proceeding;

¹⁰ Section 907.041(4), F.S., defines the term "dangerous crime" to include arson; aggravated assault; aggravated battery; illegal use of explosives; child abuse or aggravated child abuse; abuse or aggravated abuse of an elderly person or disabled adult; aircraft piracy; kidnapping; homicide; manslaughter; sexual battery; robbery; carjacking; lewd, lascivious, or indecent assault or act upon or in presence of a child under 16 years; sexual activity with a child, who is 12 years of age or older but less than 18 years of age, by or at solicitation of person in familial or custodial authority; burglary of a dwelling; stalking or aggravated stalking; act of domestic violence; home invasion robbery; act of terrorism; manufacturing any substances in violation of ch. 893; and attempting or conspiring to commit any of the aforementioned crimes.

¹¹ Report No. 10-08.

¹² *Id.*

- Is not, at the time of the arrest, subject to or on probation for another charge and is not facing charges for another crime anywhere in this state;
- Has no prior convictions involving violence; and
- Satisfies any other limitation upon eligibility for release which is in addition to those above, whether established by the board of county commissioners or the court.

The bill requires the court to determine whether a defendant is eligible to participate in a pretrial release program and requires pretrial release programs to certify in writing to the court that the defendant satisfies each of the above requirements before a determination is made concerning the defendant's eligibility for placement in the program. Judges would still be permitted to release defendants on their own recognizance.

The bill requires pretrial release programs to notify every defendant released to the program of the times and places at which the defendant is required to appear before the court.

The bill also specifies that if a defendant seeks to post a surety bond pursuant to a bond schedule established by administrative order, the defendant must do so without any interaction with, or restriction by, a pretrial release program.

The bill specifies that a court may impose any reasonable conditions of pretrial release upon any defendant (i.e., defendants released to a pretrial release program or released on bond). The bill provides that a court may order a defendant to pay for any services ordered as a condition of release.

The bill prohibits pretrial release programs from charging defendants any fees other than those authorized by state law.¹³ However, the bill specifies that pretrial release programs may charge defendants fees for services that have been ordered by the court as a condition of release, such as electronic monitoring, drug testing, substances abuse treatment, etc.

The bill specifies that a court may order a defendant who does not meet the above-described eligibility requirements to participate in a pretrial release program if the defendant is eligible under state law to participate in a drug court program, mental health court program, or a prison diversion program established pursuant to s. 921.00241, F.S.

The bill provides that all pretrial release programs established by ordinance of the county commission, by administrative order of the court, or by any other means, enacted or established to facilitate the release of defendants from pretrial custody, are subject to the above provisions, which supersede and preempt all local ordinances, orders, or practices.

The bill also amends s. 907.043(3), F.S., to require pretrial release programs to update the program's register monthly rather than weekly.

B. SECTION DIRECTORY:

Section 1. Amends s. 907.041, F.S., relating to pretrial detention and release.

Section 2. Amends s. 907.043, F.S., relating to pretrial release; citizens' right to know.

Section 3. Provides an effective date of October 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

¹³ Florida Statutes do not currently contain any provisions authorizing pretrial release programs to charge defendants any fees nor does the bill authorize any.

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This bill may have a significant negative fiscal impact on local government. See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The bill will likely result in a reduction in the number of defendants eligible for pretrial release programs. Defendants who are unable to participate in pretrial release programs will instead have to post bail to gain pretrial release (or be released on their own recognizance). It is likely that some of these defendants will use the services of a bail bondsman to obtain the bail amount. As a result, bail bondsmen are likely to see an increase in business.

D. FISCAL COMMENTS:

The bill will likely result in a reduction in the number of defendants eligible for pretrial release programs. Defendants who are unable to participate in pretrial release programs will instead have to post bail to gain pretrial release (or be released on their own recognizance). A portion of these defendants will not have the funds to post a bond and will remain in jail until the disposition of their case. Other defendants may ultimately post a bond, but may spend additional time in jail while accumulating the funds to do so. In either case, counties may see an increased need for jail beds. Some counties, depending on the size and population of their jail facilities, may need to construct additional jail beds.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision appears to apply because the bill may require counties or municipalities to spend funds or take an action requiring the expenditure of funds. However, if the legislature determines that the bill fulfills an important state interest, an exception to the mandates provision exists because the bill applies to all persons similarly situated, including the state.

2. Other:

As noted above, Rule 3.131(b) of the Florida Rules of Criminal Procedure requires judges to impose *the first* of the following conditions of release that will reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process:

- Personal recognizance of the defendant;
- Execution of an unsecured appearance bond in an amount specified by the judge;
- Placement of restrictions on the travel, association, or place of abode of the defendant during the period of release;

- Placement of the defendant in the custody of a designated person or organization agreeing to supervise the defendant (e.g., pretrial release programs);
- Execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or
- Any other condition deemed reasonably necessary to assure appearance as required.

Statutes which purport to create or modify a procedural rule of court, rather than substantive rule of court, are constitutionally infirm.¹⁴ This principle is grounded in Art. V, Section 2(a) of the Florida Constitution, which states that the Florida Supreme Court shall adopt rules for the practice and procedure in all courts. Furthermore, Art. II, Section 3, of the state constitution, the separation of powers provision, provides that powers constitutionally bestowed upon the courts may not be exercised by the Legislature.

In *State v. Raymond*, the Florida Supreme Court declared s. 907.041(4)(b), F.S., which prohibited persons charged with dangerous crimes from being granted nonmonetary pretrial release at a first appearance hearing, an unconstitutional violation of the separation of powers in Article II, Section 3 of the Florida Constitution.¹⁵

The court stated that the terms practice and procedure “encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. ‘Practice and procedure’ may be described as the machinery of the judicial process as opposed to the product thereof.”¹⁶ In contrast, matters of substantive law are within the Legislature's domain. Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer.¹⁷ It includes those rules and principles which fix and declare the primary rights of individuals with respect to their persons and property.¹⁸

It is possible that the statute created by this bill will be challenged on the grounds that it violates the separation of powers provision of the state constitution by dealing with procedural matters that are the province of the court.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 26, 2010, the Criminal & Civil Justice Appropriations Committee adopted a strike-all amendment, and two amendments to the strike-all amendment. The strike-all amendment, as amended:

- Specifies that pretrial release programs established by ordinance or by administrative order are subject to the provisions of the bill which supersede and preempt all local ordinances, orders, or practices.
- Provides that a person may participate in a pretrial released program if not charged with a capital, life, or first degree felony and has not willfully failed to appear, within the past year, at any court proceedings.

¹⁴ *State v. Raymond*, 906 So.2d 1045 (Fla. 2005) citing *Markert v. Johnston*, 367 So.2d 1003 (Fla. 1978) and *Military Park Fire Control Tax Dist. No. 4 v. DeMarois*, 407 So.2d 1020 (Fla. 4th DCA 1981).

¹⁵ 906 So.2d 1045 (Fla. 2005)

¹⁶ *State v. Raymond*, 906 So.2d 1045 (Fla. 2005) citing *In re Fla. Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1972) (Adkins, J., concurring).

¹⁷ *State v. Raymond*, 906 So.2d 1045 (Fla. 2005) citing *State v. Garcia*, 229 So.2d 236 (Fla. 1969).

¹⁸ *State v. Raymond*, 906 So.2d 1045 (Fla. 2005) citing *Adams v. Wright*, 403 So.2d 391 (Fla. 1981).

- Removes indigency as an eligibility requirement for participation in pretrial release programs.
- Specifies that the bill does not prohibit the court from imposing any reasonable conditions of release and authorize the court to order defendants to pay for services ordered as a condition of release.
- Prohibits a pretrial release program from charging defendants any fees other than those authorized by state law.
- Allows pretrial release programs to charge defendants for services that have been ordered by the court as a condition of release.
- Permits a court to order a defendant who does not meet the pretrial release program criteria established by the bill to participate in a pretrial release program so long as the defendant is eligible under state law to participate in a drug court program, a mental health court program, or a prison diversion program.
- Amends s. 907.043(3), F.S., to require pretrial release programs to update the program's register monthly rather than weekly.
- Changes the effective date from July 1, 2010 to October 1, 2010.

The bill was reported favorably as a committee substitute. This analysis reflects the committee substitute.